DEC 3 1 1957
JOHN T. ... Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 690

ORVILLE J. TIPPET, *Petitioner*

v.

GUY A. THOMPSON, TRUSTEE, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, Texas

Of Counsel:
FLOYD ENLOW
WILEY THOMAS
ENLOW KEE & THOMAS
First National Building
Angleton, Texas

LELAND B. KEE
First National Building
Angleton, Texas
Counsel for Petitioner

ALPHA LAW BRIEF CO., 402 M & M BLDG., HOUSTON 2

SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
I. STATEMENT OF THE MATTER INVOLVED	2
II. JURISDICTION	5
III. QUESTION PRESENTED	7
IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT	9
V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT	11
VI. CONCLUSION	22
VII. APPENDIX A (OPINION GUY A. THOMPSON, TRUSTEE, ET AL. v. ORVILLE J. TIPPIT)	23
APPENDIX B—28 U.S.C. 1257(3)	39
APPENDIX C—45 U.S.C. 51	40

TABLE OF CASES CITED

	PAGE
Adam v. Saenger, Tex., 58 S. Ct. 28, 302 U.S. 668, 82 L. Ed. 515, gr'g certiorari 101 S.W. 2d 1016, rev. 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 610, 303 U.S. 666, 82 L. Ed. 1123, conformed to 119 S.W. 2d 687, certiorari denied Saenger v. Adam, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511	2
Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 610, 303 U.S. 666, 82 L. Ed. 1123, conformed to Civ. App. 119 S.W. 2d 687, certiorari denied, Saenger v. Adam, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511	3
Adam v. Saenger, Tex., 58 S. Ct. 610, 303 U.S. 666, 82 L. Ed. 1123, den'g rehearing 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649. Rev. 101 S.W. 2d 1016. Cert. gr. 58 S. Ct. 29, 302 U.S. 668, 82 L. Ed. 515, conformed to 119 S.W. 2d 687, cert. den. Saenger v. Adam, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511	3
Arnold v. Panhandle & S.F. Ry. Co., 353 U.S. 360, 77 S. Ct. 840, 1 L. Ed. 889	8, 20
Atchison v. Texas & Pacific Ry. Co. (Sup. Ct.), 186 S.W. 2d 227	16
Bailey v. Central Vermont R. Co., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444	7
Blair v. Baltimore & Ohio R. Co. 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490	8
Carter v. Travelers Insurance Co., 120 S.W. 2d 582, 132 Tex. 288	19
Deen v. Gulf, C. & S.F. Ry. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721	8, 20
Federal Underwriters Exchange v. Polson, 148 S.W. 2d 936	19
Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511	6
Gibson v. Guy A. Thompson, Trustee, —U.S.—, 78 S. Ct. 2	8, 20, 21
Gulf, Colorado & Santa Fe Ry. Co. v. Ballew, et al. (Comm. App.), 66 S.W. 2d 659	16
Hopson v. Gulf Oil Corp. (Sup. Ct.), 237 S.W. 2d 352	16
International Great Northern Ry. Co. v. Lowrey (Sup. Ct.), 121 S.W. 2d 585	16

CASES	PAGE
McGuigan v. Southern Pacific R. Co., 277 Pac. 24 444, 129 C.A. 2d 482	19
Michigan-Wisconsin Pipe Line Co. v. Calvert, U.S. Tex., 74 S. Ct. 396, 347 U.S. 157, 98 L. Ed. 583, rehearing denied	3
Michigan-Wisconsin Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U.S. 931, 98 L. Ed. 1083	3
Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U.S. 931, 98 L. Ed. 1083	3
Port Terminal RR. Ass'n v. Ross, 280 S.W. 2d 220 (Sup. Ct. of Texas)	15, 17
Ringhiser v. Chesapeake & Ohio Ry. Co., 351 U.S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268	8, 18
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493	7, 21
San Antonio & A. P. Ry. Co. v. Behne (Comm. App., opinion adopted by Sup. Ct.) 231 S.W. 351	16
Stewart v. Baltimore & Ohio R. Co., 137 Fed. 2d 527	11, 16, 17, 19
Stinson, Administratrix v. Atlantic Coast Line RR. Co., 78 S. Ct. 136	21
Stone v. New York, C. & St. L.R. Co., 344 U.S. 407, 73 S. Ct. 358	7, 13, 17
Thomson v. Texas & Pacific Ry. Co., 353 U.S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722	8
Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018	7, 19
Webb v. Illinois Central R. Co., 352 U.S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503	7

STATUTES CITED

28 U.S.C.A., Sec. 1257	2, 8
28 U.S.C.A., Sec. 1257, Sub-Sec. (3)	8
45 U.S.C., Sec. 51	8
45 U.S.C.A., Sec. 51, et seq.	2, 20

IN THE

Supreme Court of the United States

October Term, 1957

No. _____

ORVILLE J. TIPPET, *Petitioner*

v.

GUY A. THOMPSON, TRUSTEE, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, Texas

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Orville J. Tippet, of Brazoria County, Texas, Petitioner herein, prays that a writ of certiorari be issued to review the final decree of the Court of Civil Appeals for the First Supreme Judicial District of Texas, reversing the judgment of a trial court based on findings of fact made by a jury in a Federal Employers' Liability Act case in favor of Petitioner, an injured railway employee, and rendering judgment that Tippet recover nothing against his employer, Guy A. Thompson, Trustee (Tr. p. 4).

I. Statement of the Matter Involved

1. The Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston (formerly at Galveston), denied Petitioner his right of trial by jury guaranteed by the Constitution and given him by Congress under the Federal Employers' Liability Act (45 *U.S.C.A.*, Sec. 51, et seq.) by disregarding all findings of the jury on conflicting evidence favorable to the injured employee and giving full force and effect to all findings of the jury favorable to the railway company (300 S.W. 2d 351). The Supreme Court of Texas refused an application for writ of error for want of merit, July 10, 1957 (certified copy of order appears in the record), and motion for rehearing of application was overruled October 2, 1957 (certified copy of order appears in the record). The Court of Civil Appeals is thus the highest court of a State in which a decision could be had within the meaning of 28 *U.S.C.A.*, Sec. 1257, as construed by the Honorable Supreme Court of the United States, in

Michigan-Wisconsin Pipe Line Co. v. Calvert, U.S. Tex., 74 S. Ct. 396, 347 U.S. 157, 98 L. Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U.S. 931, 98 L. Ed. 1083;

Michigan-Wisconsin Pipe Line Co. v. Calvert, 74 S. Ct. 528, 347 U.S. 931, 98 L. Ed. 1083;

Adam v. Saenger, Tex., 58 S. Ct. 28, 302 U.S. 668, 82 L. Ed. 515, gr'g certiorari 101 S.W. 2d 1046, rev. 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U.S. 666, 82 L. Ed. 1123, conformed to 119 S.W. 2d 687, certiorari denied *Saenger v. Adam*, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649, rehearing denied 58 S. Ct. 640, 303 U.S. 666, 82 L. Ed. 1123, conformed to Civ. App. 119 S.W. 2d 687, certiorari denied *Saenger v. Adam*, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511;

Adam v. Saenger, Tex., 58 S. Ct. 640, 303 U.S. 666, 82 L. Ed. 1123, den'g rehearing 58 S. Ct. 454, 303 U.S. 59, 82 L. Ed. 649, Rev. 101 S.W. 2d 1046, cert. gr. 58 S. Ct. 29, 302 U.S. 668, 82 L. Ed. 515, conformed to 119 S.W. 2d 687, cert. den. *Saenger v. Adam*, 59 S. Ct. 832, 307 U.S. 628, 83 L. Ed. 1511.

2. Petitioner, Orville J. Tippet, age forty (S.F. p. 170), and employed for many years by Respondent in railroad section work, first as a hand and later as a section gang foreman (S.F. p. 73), sustained permanent and totally disabling injuries (S.F. p. 299), while engaged in the work of his employer in removing and replacing two signal switch ties, each 16 ft. in length, and each weighing 500 lbs. (S.F. p. 123), which ties supported Respondents' railroad main line, as well as a siding switch and a very weighty mechanical switching device placed alongside the track (S.F. p. 136).

The crew with which Petitioner worked ordinarily in performing the work customarily assigned to a section gang, consisted of Petitioner and five others (S.F. p. 106), but on the day of Petitioner's injury the crew was short one employee, who was on a two-week vacation (S.F. p. 107).

At the time Petitioner was instructed by his superior, the Road Master, to remove and replace the two signal switch ties, Petitioner informed the Road Master that additional help would be required for this job (S.F. p.

107), and requested the Road Master to furnish additional help (S.F. p. 108), which request was refused, with instructions from the Road Master to "do the best we can with what we had to do it with" (S.F. p. 109), and to get the signal switch ties installed before the first of July (S.F. p. 109).

By reason of the presence of the heavy switching machine and certain connecting steel plates and rods, the details of removing the signal switch tie were complicated. Respondent's Division Engineer, T. C. McCord, testified that it was an unusual job, out of the ordinary and seldom required (S.F. pp. 63-64), (as railroad ties normally last 25 years), (S.F. p. 15). In fact, it was a job which was ordinarily done by an "extra gang" (S.F. p. 105), which is a crew employed in accomplishing work heavier than ordinary (S.F. p. 9). An extra gang often contains as many as forty men, as compared to six in a "section gang" (S.F. p. 13). Petitioners' immediate superior, the Road Master, had an "extra gang" under his supervision and subject to his assignment (S.F. p. 9). Further, the Road Master had ten section gangs under his supervision (S.F. p. 6), and subject to his assignment (S.F. p. 7), also, and it was the practice when heavy and unusual work was to be done, to shift a crew from one section to another to help out on such work (S.F. p. 7).

On the occasion of Petitioner's injury three members of Petitioner's crew were required to pry and lift the weight of the rails, signal switch machine, plates and rods off the signal switch ties (S.F. p. 122), leaving only two men to do the actual work of loosening, pulling, removing and replacing the heavy and lengthy signal switch ties (S.F. p. 123). Petitioner and Taylor Hall, a fellow employee, being the two largest and strongest men in the crew (S.F.

p. 123), undertook to carry out the Respondent's instructions to remove and replace the signal switch ties, while the other three smaller members of the crew pried up the rails, rods and plates.

While tugging and pulling on the heavy timber, Petitioner was subjected to unusually severe strain and over-exertion (S.F. p. 166), from which, while still working, he suffered damage to his heart (S.F. p. 138), resulting in total permanent disability (S.F. p. 299). Had Respondent furnished Petitioner additional help, as requested, Petitioner would not have been subjected to excessive strain and physical exertion and the strain to which he was subjected would have been so lessened that such injury to his heart would not have resulted (S.F. pp. 166-167).

The medical witnesses expressly stated that the cause of Petitioner's injury was the severe physical exertion to which Petitioner was subjected, the witness Dr. James Stubbs stating —

> "I feel the thing that (was) precipitated the acute symptoms was the sudden exertion." * * *"
>
> "* * * It usually takes a rather severe physical exertion to precipitate it." (S.F. p. 301).

Dr. W. T. Harrison stated that in his opinion Petitioner suffered damage to his heart on the occasion in question, resulting from strain and over-exertion (S.F. pp. 217-218).

After undergoing the severe strain and over-exertion for several minutes, Petitioner's pain became so severe that he left the job and went to the office of a doctor employed by Respondent (S.F. pp. 139 & 143), where he received emergency treatment, and later the same day he was trans-

ferred by ambulance to a hospital (S.F. p. 141), where an electrocardiogram was made. Petitioner remained hospitalized for approximately eleven weeks (S.F. pp. 141 & 143). At the time of the trial on April 2, 1956, Petitioner, according to the medical testimony, had no further work expectancy (S.F. p. 299).

In the opinion of Petitioner, issues of fact are involved here and those issues were correctly submitted to the jury by the Trial Court. The jury answered some issues favorably to Petitioner and some favorably to Respondent. The findings of the jury may be summarized as follows:

> (1) At the time and on the occasion in question inquired about in this law suit plaintiff sustained injury to his body.
>
> (2) Such injury was sustained on June 27, 1952.
>
> (3) Plaintiff was removing old switch ties and installing new ones at the time he sustained such injury.
>
> (4) Defendants failed to supply Plaintiff with a sufficient number of men to enable Plaintiff to safely do the work he was undertaking, in removing old switch ties and installing new ones.
>
> (5) Defendants were negligent in failing to supply Plaintiff with a sufficient number of men to enable Plaintiff to safely do the work he was undertaking, in removing old switch ties and installing new ones.
>
> (6) Defendants negligence was a proximate cause and of the injury sustained by Plaintiff on the occasion in question.
>
> (7) Defendants did not fail to supply Petitioner with proper mechanical aids to enable Plaintiff to safely do the work he was undertaking, in removing old switch ties and installing new ones.

(8) Being predicated on affirmative answer to No. 7, this issue was not answered.

(9) Being predicated on affirmative answer to No. 8, this issue was not answered.

(10) That $72,000.00 would reasonably compensate Plaintiff for his injuries. (Trial Ct. Tr. pp. 37-44).

No issue as to the contributory negligence of Petitioner nor any other affirmative defensive issue was requested by Respondent or submitted to the jury by the Trial Court.

3. The Trial Court entered judgment for Plaintiff on the jury verdict in the sum of $72,000.00 with interest thereon at the rate of 6% per annum from May 4, 1956, and all cost of court, which is the only judgment that could be rendered without disregarding the findings of the jury, (Trial Ct. Tr. pp. 49-57). The Texas Court of Civil Appeals set aside the verdict of the jury and the judgment rendered thereon, and rendered judgment that the Plaintiff recover nothing (Opinion, *Guy A. Thompson, Trustee, et al., Appellants v. Orville J. Tippet, Appellee*, 300 S.W. 2d 3 copy of which is hereto appended).

4. Petitioner contends that in reaching this result, the Texas Court of Civil Appeals ruled contrary to the principles of law pronounced by this Court, in

Stone v. New York, C. & St. L. R. Co., 344 U.S. 407, 73 S. Ct. 358;
Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018;
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493;
Webb v. Illinois Central R. Co., 352 U.S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503;

Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511;
Deen v. Gulf, C. & S. F. Ry. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721;
Thompson v. Texas & Pacific Ry. Co., 353 U.S. 926, 77 S. Ct. 698, 1 L. Ed. 2d 722;
Arnold v. Panhandle & S. F. Ry. Co., 353 U.S. 369, 77 S. Ct. 840, 1 L. Ed. 889;
Ringhiser v. Chesapeake & O. Ry. Co., 354 U.S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268;
Gibson v. Guy A. Thompson, Trustee, _____ U.S. _____, 78 S. Ct. 2;
Bailey v. Central Vermont R. Co., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;
Blair v. Baltimore & Ohio R. Co., 323 U.S. 600, 65 S. Ct. 545, 89 L. Ed. 490.

II. Jurisdiction

1. Jurisdiction to grant this Petition is sustained by Title 28, *U. S. C. A.*, Section 1257, sub-section (3). (June 25, 1948, c. 646, 62 Stat. 929).

2. The Statutes of the United States applied by the Court of Civil Appeals of Texas are 45 *U. S. C. A.*, Sections 51-59 (35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404).

3. The judgment of the Court of Civil Appeals of Texas was rendered March 14, 1957, re-hearing denied April 4, 1957, as shown by the opinion reported in 300 S.W. 2d 351, copy of which is hereto appended.

4. As shown above, the Court of Civil Appeals is the highest court of the State in which a decision could be had within the meaning of 28 *U. S. C. A.*, Sec. 1257. Application for writ of error to the Supreme Court of Texas

was refused, no reversible error, July 10, 1957, and motion for re-hearing of application was overruled October 2, 1957. (Certified copies of both orders are included in the Transcript which accompanies this application).

III. Question Presented

The question presented is whether the Court of Civil Appeals of Texas in disregarding all issues found by the jury in favor of the injured employee, and in setting aside a judgment of a trial court rendered in favor of the injured employee on the verdict of the jury, has deprived the injured employee of the right of trial by jury given him under a Federal Statute generally known as the Federal Employers' Liability Act.

IV. Reasons Relied on for Allowance of Writ

The jury found in favor of Petitioner Tippet that:

> (1) Tippet sustained injury to his body, (2) on June 27, 1952, (3) while removing old switch ties and installing new ones.
>
> (4) The employer failed to supply Tippet with a sufficient number of men to enable him to safely do the work he was undertaking in removing old switch ties and installing new ones.
>
> (5) The employer was negligent in failing to supply Tippet with a sufficient number of men.
>
> (6) The employer's negligence was a proximate cause of Tippet's injury.

Petitioner submits that the record in this cause contains ample evidence to support the verdict of the jury on each of the above issues. The jury weighed the evidence and

decided for Petitioner and against the railway company on each of the above issues. The Trial Judge having heard all the evidence from the witnesses, obviously believed the evidence supported the jury verdict, and entered judgment thereon for Petitioner.

The jury also found against Tippet on the issue of whether the employer failed to supply Tippet with proper mechanical aids, as well as on the issues of negligence and proximate cause related thereto.

The evidence was conflicting on all of the issues. The jury, reflecting an unbiased and unprejudiced attitude, found against Petitioner on some of the issues and for him on others. Respondent makes no complaint that the jury was unfair or that it improperly weighed the evidence, or that there was no evidence on the issues the jury found for Respondent. It is only on the issues found in favor of Petitioner and against Respondent that the Respondent and Court of Civil Appeals find no evidence to support.

Due to the nature of Petitioner's injury, many of the questions involved in this cause of action were highly technical. Petitioner, therefore, presented to the Court four medical witnesses, two of them being specialized and highly qualified in the field of internal medicine relating to injuries to the heart and blood vessels. It is submitted that the Court of Civil Appeals in disregarding all findings of the jury and reversing the judgment of the Trial Court based on the jury verdict, has disregarded the testimony of the highly qualified witnesses, in support of the verdict, has viewed the evidence in a light most favorable to the destruction of the jury verdict, rather than in a light most favorable to the support thereof, and has substituted the Court's own interpretation of what the evidence should

be, thereby substituting judicial authority for record testimony in support of the jury verdict. The Court of Civil Appeals has thereby deprived the Petitioner of his right of trial by jury given him by Congress under the Federal Employers' Liability Act.

V. Argument Amplifying Reasons Relied on for the Allowance of the Writ

At the time Petitioner sustained his injury he was not engaged in an ordinary routine job such as was customarily assigned to a section gang. Rather, it is shown by the evidence that the work which Petitioner was instructed to do by his superior, the Road Master, was an unusual job, out of the ordinary and seldom required (S.F. pp. 63-64), as railroad ties normally last twenty-five years, and there were only five such signal switches located in the section of Respondents railroad track assigned to Petitioner, with two 16 foot ties under each switch (S.F. pp. 469-470). Because of the difficulty in removing and replacing signal switch ties it was a job which was ordinarily performed by an extra gang (S.F. p. 105). At the Danbury switch where Petitioner received his injury the situation was particularly difficult because the 16 ft. long, 500 lb. weight ties had to be removed from underneath the four rails, steel plates, connecting rods, and heavy switching device, to the east where a team track was located. Because there was insufficient space between the main line and the team track the ties had to be lifted over the team track in order to remove them (S.F. p. 126). Since only approximately one-half inch of clearance could be obtained between the signal switch ties and the plates and rails resting on them (S.F. p. 131), it became especially difficult to lift the ties the necessary height to clear the team track.

Petitioner's superior, the Road Master, as well as Petitioner, were *both aware of the difficulties involved in* this undertaking. The difficulty of the situation and the fact that the job was customarily assigned to an extra gang composed of up to as many as forty or more men, with additional equipment, explains Petitioner's action in informing his superior that additional help was required for his section gang (which was at that time composed of one less than its ordinary number of six men), to perform this task, and in requesting such additional help.

Since the Road Master knew that these ties lasted up to twenty-five years, and he not only had under his supervision an extra gang, but also had under his supervision and subject to his assignment ten section gangs, and since it was the custom for the Road Master to shift personnel from one section gang to another, or to shift entire gangs from one section to another, to assist in performing unusually difficult jobs, or heavier work, it is obvious, and the jury was entitled to presume, that by proper attention the Road Master could have so arranged the schedule for replacing these heavy signal switch ties so that the work could have been accomplished at a time when a section gang was available or at a time when the Road Master could have transferred men from another section to assist Petitioner in this work. Nevertheless, it is undisputed that the Road Master instructed Petitioner: "He told me to do the best I could with what I had, we were to get the ties in" before the first of July (S.F. p. 109).

The Honorable Court of Civil Appeals found this action on the part of the Road Master to amount to "a categorical instruction to do the work short handed" (Tr. p. 6).

The criterion for determining whether the Road Master *was negligent in ordering Petitioner to proceed with this* work with an insufficient crew is correctly stated in

Stone v. New York C. & St. L. R. Co., 344 U.S. 407, 73 S. Ct. 358.

"We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. Wilkerson v. McCarthy, 336 U.S. 53, 61, 69 S. Ct. 413, 417, 93 L. Ed. 497. The straw boss had additional men to put on the tongs. He also had three alternative methods for removing stubborn ties. This was not the first difficult tie encountered by the section crew in this stretch of track. *The likelihood of injury to men pulling or lifting beyond their capacity is obvious.* Whether the straw boss in light of the risks should have used another or different method to remove the tie or failing to do so was culpable is the issue. *To us it appears to be a debatable issue on which fair-minded men would differ.* Cf. Bailey v. Central Vermont R. Co., 319 U.S. 350, 353, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Urie v. Thompson, 337 U.S. 163, 178, 69 S. Ct. 1018, 1028, 93 L. Ed. 1282. The experience with stubborn ties, the alternative ways of removing them, *the warning by petitioner that he had been pulling as hard as he could, the command of his superior to pull harder, the fact that more than two men were usually used in these circumstances*—all these facts comprise the situation to be appraised in determining whether respondent was negligent. *Those circumstances were for the trier of facts to appraise.* Cf. Blair v. Baltimore & O. R. Co., 323 U.S. 600, 604, 65 S. Ct. 545, 547, 89 L. Ed. 490." (Emphasis added)

The *Stone* case, being an action under the Federal Employers' Liability Act and involving a very similar fact

situation, clearly demonstrates that the question of whether the Respondent Road Master was negligent in instructing Petitioner to proceed with an insufficient crew, involved a set of circumstances for the trier of facts to appraise.

The Honorable Court of Civil Appeals of Texas, although finding that Respondent instructed Petitioner to do the work short handed, and although the Court appears to find such action to constitute negligence, it has nevertheless held that the record in this cause is "devoid of any evidence from which it may be fairly said that the defendant was charged with notice of any fact or facts from which the *heart attack* which plaintiff sustained could be anticipated as a result of the work to which he was assigned." (Tr. pp. 11-12). The Court of Civil Appeals has thereby not only ignored the testimony in the record in this cause, but has ignored well established rules of law. As stated in

Stewart v. Baltimore & Ohio R. Co., 137 Fed. 2d 527,

a case in which a railway employee died as a result of a coronary thrombosis, which in turn was found to have resulted from strain and over-exertion, the Federal Circuit Court held that—

> "Over-exertion resulting in serious casualties is something which can as well be foreseen as many other occurrences and is something which an employer may be thought bound to take all reasonably steps to prevent."

It was also held in the *Stewart* case—

> *"There have been many decisions which have held that it is negligent to require a workman to move*

articles that are too heavy for him to lift without help. Albertz v. Bache, G. T., First Dept.; 57 Hun 592, 10 N.Y.S. 639; Bowman v. Kansas City Electric Light Co., No. App. 213 S.W. 161; Stewart Dry Goods Co. v. Boone, 175 Ky. 271, 194 S.W. 103; Illinois Cent. R. Co. v. Langan, 116 Ky. 518, 76 S.W. 32; Culver v. Union Pac. R. Co., 212 Neb. 441, 444, 445, 199 N.W. 794; Rice v. Garrett, Tex. Civ. App. 194 S.W. 667; Bonn v. Galveston & S.A. R. Co., Tex. Civ. App., 82 S.W. 808; Boyd v. Great Northern R. Co., 84 Mont. 84, 274 P. 293." (Emphasis added)

The Court of Civil Appeals of Texas in its opinion italicized (and thereby emphasized) the words "the heart attack", thereby clearly demonstrating that the Court was holding that there must be evidence from which Respondent could anticipate that plaintiff might sustain the specific injury, that is, "the heart attack".

The contrary rule is well established in Texas and elsewhere, as stated in

Port Terminal RR. Ass'n v. Ross, 289 S.W. 2d 220 (Sup. Ct. of Tex.),

"It has also been pointed out repeatedly that for the defendant's negligence to be regarded as a proximate cause of the plaintiff's injury, it is not necessary that the exact nature of the injury or the precise manner of its infliction should reasonably have been foreseen. It is sufficient that the defendant should reasonably have anticipated consequences or an injury of the general nature of that which ensued. See Hopson v. Gulf Oil Corp., 150 Tex. 1, 237 S.W. 2d 352, and authorities cited therein."

Hopson v. Gulf Oil Corp. (Sup. Ct.), 237 S.W. 2d 352;

San Antonio & A. P. Ry. Co. v. Behne (Comm. of Apps., opinion adopted by Sup. Ct.), 231 S.W. 354;

International Great Northern Ry. Co. v. Loucey (Sup. Ct.), 121 S.W. 2d 585;

Atchison v. Texas & Pac. Ry. Co. (Sup. Ct.), 186 S.W. 2d 227;

Gulf Colorado & Santa Fe Ry. Co. v. Ballew, et al. (Comm. App.), 66 S.W. 2d 659.

In the *Stewart* case the Court cited numerous cases where negligence in failing to furnish sufficient force to do heavy work resulted in recovery for the injured employee. In one, the employee sustained a wrenched and strained back and dislocation of vertebra from carrying a too heavy timber over broken ground; in another, the employee received a double rupture from carrying a heavy rail; in another, a broken leg was suffered by an inexperienced workman in attempting to lift a heavy piece of glass; still another, a back injury from lifting a heavy handcar from the ground to a box car; and in one, the employee sustained a hemorrhage from lifting and carrying a heavy angle iron to a platform.

If Petitioner had, as a result of strain and over-exertion, sustained a strained muscle, wrenched back, hernia, or had suffered a hemorrhage, it appears that the Honorable Court of Civil Appeals would have recognized each of these injuries as being one of a class which might reasonably be anticipated to result from strain and over-exertion. The medical witnesses in this case, as previously stated, were highly trained and experienced in their field. They testified, and as admitted by the Court of Civil Appeals "all the doctors testified that in Mr. Tippet's case

the 'precipitating cause' of Mr. Tippet's heart attack was the strain or exertion to which he was subjected in his work on June 27, 1952." In fact, one of the witnesses, Dr. Stubbs, testified that an employer with ordinary common sense might foresee that in putting employees on a job that was more than they should undertake, that somebody would get hurt, have a heart attack, strain a ligament or suffer some damage as a result thereof (S.F. pp. 313-314).

The requirement of the law is that the employer should anticipate consequences or an injury of the general nature of that which ensued.

> *Port Terminal RR. Ass'n v. Ross*, 289 S.W. 2d 220 (Sup. Ct. of Tex.), supra, and cases at Page 21 supra.

Over-exertion resulting in serious casualties has been held to be an event which can as well be foreseen as many other occurrences and is something which an employer should take all reasonable steps to prevent.

> *Stewart v. Baltimore & Ohio R. Co.*, 137 Fed. 2d 527, supra.

Specifically this Court has held that the likelihood of injury to men pulling or lifting beyond their capacity is obvious and that the question of negligence and proximate cause (including therein the element of foreseeability or anticipation of injury) in such a case are questions for the jury.

> *Stone v. New York C. & St. L. R. Co.*, 344 U.S. 407, 73 S. Ct. 358, supra.

That only the slightest quantum of proof is necessary to require the submission to the jury the issue of negligence

and proximate cause where the absence of foreseeability is raised as a defense, is well demonstrated in

Ringhiser v. Chesapeake & O. Ry. Co., 354 U.S. 901, 77 S. Ct. 1093, 1 L. Ed. 2d 1268.

The evidence is clear that immediately prior to the injury Petitioner Tippet was only forty years of age, in good health, had never had any symptoms of heart trouble, had never been treated by a doctor for any other organic trouble prior to June 27, 1952 (S.F. pp. 168-169). That Petitioner was in excellent health, is substantiated by the fact that on the morning that his injury occurred that he helped the members of his section gang in carrying and transporting the heavy switch ties from the place where they were stored to the scene of the accident and in so doing he and his fellow employee Taylor Hall carried the greater weight, thus relieving the smaller men in the crew of a part of their ordinary load (S.F. pp. 112-113). Thus Petitioner was able to carry more than his ordinary share of the ordinary work load without any adverse effect. As a result of carrying out his employer's instructions to proceed with the job shorthanded, Petitioner is totally and permanently disabled (S.F. p. 299).

Because the strain and over-exertion to which Petitioner Tippet was subjected resulted in injury to his heart, the Court of Civil Appeals has denied him the benefit of the jury verdict, thus denying to him the protection afforded him under the Federal Employers' Liability Act. But regardless of the fact that Petitioner suffered a heart injury, his employer's negligence has impaired and destroyed his health by requiring him to work under conditions likely to bring about harmful consequences, and he has thus sus-

tained an injury within the meaning of the Federal Employers' Liability Act.

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018.

Heart injuries occurring to persons employed under the provisions of the Federal Employers' Liability Act, and while engaged in such employment, have been recognized by the Court, both State and Federal, as an injury under the terms of the Act.

Stewart v. Baltimore & Ohio R. Co., 137 Fed. 2d 527, supra.

McGuigan v. Southern Pacific R. Co., 277 Pac. 2d 444, 129 C.A. 2d 482.

Texas Courts have likewise recognized that a coronary thrombosis, resulting from strain and over-exertion, constitutes an accidental injury for which damages may be recovered under the provisions of the Texas Workmans' Compensation Act.

Federal Underwriters Exchange v. Polson, 148 S.W. 2d 956;

Carter v. Travelers Insurance Co., 129 S.W. 2d 582, 132 Tex. 288.

While it is conceded, of course, that negligence is not a prerequisite to recovery under the Texas Workmans' Compensation Act, nevertheless, a heart injury such as coronary thrombosis would be no less an injury where negligence was present.

That Texas appellate courts have been most reluctant to follow the decisions of the Honorable Supreme Court of the United States insisting that verdicts of jury be not taken away from employees in cases arising under the Federal

Employers' Liability Act (45 U.S.C.A. 52), is demonstrated by the numerous recent instances in which this Court has reversed the appellate courts of Texas under such circumstances.

Deen v. Gulf, C. & S. F. Ry. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721;
Arnold v. Panhandle & S. F. Ry. Co., 353 U.S. 360, 77 S. Ct. 840, 1 L. Ed. 889;
Gibson v. Guy A. Thompson, Trustee, ——— U.S. ———, 78 S. Ct. 2.

The Texas Court of Civil Appeals stated in its opinion, in which the judgment of the Trial Court was reversed:

> "We know of no distinction basically between Federal and Texas law in negligence actions."

That the common law rule governs actions based on negligence in Texas, where no local statute controls, requires no citation of authority. This action was brought under the Federal Employers' Liability Act, the pertinent portion of which provides:

> "Every common carrier by railroad while engaging in commerce *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier ***." 45 U.S.C., Sec. 51; 45 U.S.C.A., Sec. 51.

That the Court of Civil Appeals of Texas erred in its conclusion that there is no distinction basically between federal and Texas law in negligence actions, has been re-

cently well stated by the Supreme Court of the United States in

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S. Ct. 443, supra.

"(6-8) Under this statute (Federal Employers' Liability Act, 45 U.S.C. Sec. 51), the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. ***"

"(9-10) The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. ***"

"The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. ***"

The same result has been reached by this Court in many recent cases, as demonstrated in

Gibson v. Guy A. Thompson, Trustee, —U.S.—, 78 S. Ct. 2, and the many cases cited therein.

See also the most recent case of

Stinson, Administratrix v. Atlantic Coast Line RR. Co., 78 S. Ct. 136.

VI. Conclusion

It is respectfully submitted that the opinion of the Court of Civil Appeals of Texas, in this case, is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that act; that a writ of certiorari should be granted in order for this Court to review the record and the opinion of the Court of Civil Appeals of Texas, and finally reverse that judgment and render judgment in favor of Petitioner and in accordance with the verdict of the jury, and Petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

LELAND B. KEE
First National Building
Angleton, Texas
Counsel for Petitioner

Of Counsel:
FLOYD ENLOW
WILEY THOMAS
ENLOW KEE & THOMAS
First National Building
Angleton, Texas

December 19, 1957

Certificate of Service

I certify that a copy of the foregoing petition for writ of certiorari has been mailed on the 23rd day of December, 1957, to the Respondents attorneys, as follows: Messrs. Woodul, Arterbury & Wren, 1828 Bank of the Southwest Building, Houston, Texas; Messrs. Hutcheson, Taliaferro & Hutcheson, 1720 Esperson Building, Houston, Texas.

LELAND B. KEE

APPENDIX A

GUY A. THOMPSON, TRUSTEE, ET AL.

v. ORVILLE J. TIPPIT

Cite as 300 S.W. 2d 351

GUY A. THOMPSON, TRUSTEE, ET AL., *Appellants*

v.

ORVILLE J. TIPPIT, *Appellee*

No. 13,077

COURT OF CIVIL APPEALS OF TEXAS

Houston

March 14, 1957

Rehearing Denied April 4, 1957

Action against railroad for damages resulting from heart attack suffered by foreman while assisting in removal and replacement of heavy switch ties. The District Court of Brazoria County, T. M. Gupton, J., entered judgment on verdict for foreman and railroad appealed. The Court of Civil Appeals, Gannon, J., held that evidence was insufficient to support jury's finding of actionable negligence on theory that employer-railroad failed to furnish a sufficient number of men to do the work safely.

Reversed.

1. Master and Servant Key 163(1)

Roadmaster's instruction to foreman to do the best he could with men he had, and roadmaster's refusal of foreman's request for another man to replace vacationing employee, amounted to categorical instruction to do work short-handed. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Master and Servant Key 278(21)

In action against railroad for damages resulting from heart attack suffered by foreman while assisting in removal and replacement of heavy switch ties, evidence was insufficient to support jury's finding of actionable negligence on theory that employer-railroad failed to furnish a sufficient number of men to do the work safely. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Master and Servant Key 206

Under Federal Employers' Liability Act, servant assumes all risks inherent in employment not arising from negligence on part of master. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and Servant Key 96(1)

Foreseeableness is an element of actionable negligence under Federal Employers' Liability Act. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Appeal and Error Key 1001(1)

In action under Federal Employers' Liability Act, jury findings of actionable negligence cannot be given effect when unsupported in the record. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Negligence Key 56(1.3), 59

Negligence, to be actionable, must be a proximate or foreseeable cause of injury.

7. Master and Servant Key 149(1)

It is not negligence on part of employer to require an employee to exert his full physical capabilities.

8. Master and Servant Key 278(21)

Even if railroad negligently failed to assign reasonably sufficient force to undertake work of removing and replacing heavy switch ties during which work foreman suffered heart attack, evidence, in action by foreman, was insufficient to charge railroad with notice of any fact from which heart attack could be anticipated as result of the work. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

9. Negligence Key 10

Although foreseeability does not demand clairvoyance to anticipate the exact and precise nature of injury complained of, for a wrongdoer to be charged with actionable negligence he must be able to anticipate at least an injury of the general nature of that which ensued.

Hutcheson, Taliaferro & Hutcheson, Woodul, Arterbury & Wren and Roy L. Arterbury and Carroll R. Graham, Houston, for appellant.

Enlow & Kee and Floyd Enlow and Leland B. Kee, Angleton, for appellee.

GANNON, Justice.

Plaintiff, Orville J. Tippit, aged forty, and employed for many years in railroad section work—first as a hand and later as a foreman—sued Missouri Pacific Railroad Company, successor to the liability of Guy A. Thompson, Trustee of the St. Louis, Brownsville & Mexico Railway Company, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages resulting from a heart attack suffered in the performance of the duties of his employment.

Plaintiff experienced his heart attack while engaged in the work of replacing two very heavy 16-foot ties which supported the main line as well as a very weighty mechanical switching device placed alongside it. Plaintiff alleged negligence in the employer's failure to furnish a sufficient force of men to do the work, as a result of which failure plaintiff with the aid of but one other man was required to pull the old rotted ties from under the main line and the switching machine and up over a nearby team track, and later replace the removed ties with new ones. There is proof that the ties weighed as much as 500 pounds apiece.

On the occasion in question the over-all work was being conducted by a section crew of which plaintiff was foreman. Ordinarily the crew consisted of plaintiff and five others, but on the day of plaintiff's heart attack the crew was short one vacationing employee. By reason of the presence of the switching machine and certain subjoined steel plates, the detail of preparing to remove the ties is complicated. Even after the switching machine and rails are jacked up, three men are required to lift the weight of the rails and the machine and subjoined plates off of the switch ties while the actual removal of the ties is in process. In the case of a short-handed crew this leaves only two men to do the actual work of loosening and removing, pulling and replacing the heavy and lengthy 16-foot ties which support the track and the switching machine. On the occasion in question plaintiff and one other man, Taylor Hall, undertook this part of the work.

It is plaintiff's claim that it was negligence for his employer to require him with the aid of only a four-man crew to attempt the work and to undergo the severe strain to which he necessarily subjected himself in doing it, which strain plaintiff claims proximately caused his heart

attack. It is plaintiff's position that an additional man by the use of a crowbar to pry under the ties and push them forward would have prevented plaintiff's being subjected to excessive strain and physical exertion in his part of the work, as he and Taylor Hall pulled on and lifted the ties with hooks tongs, and that had such extra man been furnished the train to which plaintiff was subjected would have been so mitigated that his heart attack would not have ensued.

There is evidence that before undertaking the work of removing and replacing the switch ties plaintiff requested his road master to furnish at least one additional man to replace the member of the section crew on vacation, to assist in the work of replacing the ties, but that the request was refused. Plaintiff's heart attack occurred on June 27, 1952, and there is evidence that plaintiff was instructed by the road master to do the work as best he could with the men he had and to get the ties in *before the 1st of July.*

[1] Defendant argues strenuously that the plaintiff as foreman should have waited until the 30th day of June to undertake the work, on which day the crew member on vacation was expected back, and that there is no evidence in the record that the employer expected or required plaintiff to do the work short-handed. We think this argument lacks merit. Plaintiff's testimony is that he was instructed by the road master "to do the best we can with what we had to do it with" and that the road master refused another man to replace the vacationing employee. This, we think, amounts to a categorical instruction to do the work short-handed, and circumstances considered defendant is in no position to claim it could not be anticipated that plaintiff would undertake the work with only

himself and four additional men before the very last day upon which it would be possible to do the work within the required time. In going ahead before the return of the absent employee it seems to us plaintiff was only being prudent and faithful. Had he waited until the last day of the month during which he had been positively instructed to get the work done, inclement weather or other emergency might have prevented it being accomplished within the commanded time limit.

The case was submitted to the jury on special issues, in response to which it was found: (a) that plaintiff sustained his heart attack in the course of the work of replacing the switch ties, (b) that his employer failed to furnish a sufficient number of men to do the work safely, (c) that such failure was negligence, and (d) that such negligence proximately caused plaintiff's heart attack. The verdict relieved defendant of a charge of negligence in failing to supply proper mechanical aids to enable the work to be done safely. The jury fixed plaintiff's damages at $72,000. Judgment on the verdict followed.

The principal points at issue on the appeal are: (a) is there support in the evidence for the jury's finding of negligence? and (b) if so, does the record support the finding of proximate causation?

It is undisputed that on the occasion in question plaintiff sustained a coronary thrombosis. It is equally undisputed that prior to this occurrence so far as was known to either plaintiff or his employer plaintiff was a robust, sound, healthy, individual, 40 years of age, of greater than ordinary stature and muscular development. Neither he nor his employer had any prior warning of the condition of plaintiff's arterial system which rendered him suscepti-

ble to coronary thrombosis, and the record is undisputed that no amount of physical exertion can cause coronary thrombosis in the absence of an abnormal or diseased condition of the arteries or veins, resulting from depósits of cholesteral or fatty substances which predispose thereto. We see no material or substantial divergence in the testimony of the medical witnesses on this, either those of plaintiff or defendant. Apparently all are of one school and one thought.

The processes which predispose to heart attack are well summed up by plaintiff's witness, Dr. James B. Stubbs, a specialist in the field and a professor of internal medicine at the Texas School of Medicine at Galveston. Before testifying, Dr. Stubbs had examined plaintiff, was informed of his history, and had evaluated his electrocardiograms. He described plaintiff's heart condition as "An area [partial] of localized death of the heart muscles." Asked to describe the nature of the damage to plaintiff's heart, he testified, "That means that the artery which supplies the heart muscles which are known as the coronary arteries—coronary means 'crown'—these arteries encircle the upper part of the ventricle like a crown. The coronary arteries, one or more, of the branches of the coronary arteries, *have become stopped up and have lost their ability to carry a sufficient supply of blood into the heart muscle*; the heart muscle, being without blood, uses up its reserve of nutrient oxygen and in the process dies." Asked if Mr. Tippit's heart attack could have resulted from unusual strain and over exertion, he said it could and explained that "The strain was too great for the condition of the coronary circulation on that day." However, in amplifying, the doctor said: "The normal coronary artery can withstand just

about any amount of exertion or strain demanded for increased blood supply." The doctor went on to explain that "in some individuals there is an accumulation [in the circulatory system] of a little fatty substance known as lipod" and that "This accumulation of this material encroaches upon the lumen of the coronary arteries so that there is not as much blood going to get to them" so that when increased demands from exertion are placed upon the heart, the coronary arteries are not able to fulfill their responsibilities [to supply blood] and the heart begins to show the effect by doing its work improperly and heart attack results. The doctor explained that change in coronary circulation is gradual and will exist for a considerable time before it would likely cause trouble from physical exertion, since "if a man's coronary vessels are in good shape, normal, the physical exertion does not bother him." However, he stated that in Mr. Tippit's case some time prior to his heart attack there had been an accumulation of cholesterol or fatty plaques that affected the normal flow of blood to the heart. The doctor stated Mr. Tippit would have no way of anticipating he would experience this heart attack on the occasion in question. Referring to the deteriorated condition of Mr. Tippit's blood vessels, the doctor explained that in the case of heart attack there is a "predisposing cause and then an exciting cause" and that Mr. Tippit had a condition "to prevent a sufficiency of flow" [of blood] when the exertion came and that whatever that condition was, it did not exist back when Mr. Tippit was able to do strenuous physical labor without ill effect. In the case of one with Mr. Tippit's arterial condition a heart attack can be precipitated by severe exertion or even by excitement from watching a horse race or a football game.

Dr. Harrison, another of plaintiff's medical witnesses, explained there was a narrowing of Mr. Tippit's blood vessels prior to the attack and "there has to be an underlying process before you can have a heart attack." The doctor testified that from Mr. Tippit's history there was no reason either for him or his employer to assume he had any deficiency in blood circulation reserve.

[1] All the doctors testified that in Mr. Tippit's case the "precipitating" cause of Mr. Tippit's heart attack was the strain or exertion to which he was subjected in his work on June 27, 1952, but all refer to the underlying cause as his arterial condition, which all describe as abnormal. That Mr. Tippit's condition was abnormal is obvious from the fact that most of us are subjected to strenuous and severe exertion from time to time without suffering the consequeces which befell Mr. Tippit.

[2] Without further detail of the facts, the record shows that the defendant or his predecessor knowingly assigned Mr. Tippit to work on his section on June 27, 1952, which might very well require Mr. Tippit to exert himself to the extent of his full strength in its accomplishment, but there is nothing in the evidence to show any fact from which either Mr. Tippit or his employer had reason to suppose that such exertion, however strenuous, would result in Mr. Tippit sustaining a heart attack and this for the reason that neither knew of the presence of the underlying predisposing condition in Mr. Tippit's arterial system which made heart attack likely from exertion, however severe. As we see it, the most the record shows is that had another man been assigned to the work, Mr. Tippit and his co-laborer assisting him in removing and replacing ties would have been relieved of the necessity of exerting their full strength which naturally would have rendered the task

easier but not less foreseeably dangerous to Mr. Tippit. There is no evidence to show that had Mr. Tippit been required to put forth somewhat less exertion on the occasion in question his heart attack would not have occurred. We do not think the evidence supports the jury's findings of actionable negligence.

[3-5] We are aware that this case, being under the Federal Employer's Liability Act, is governed by the federal common law. Amendments to the Act have gone far to curtail available defenses. Still, to quote Justice Black, writing in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 451, 87 L. Ed. 610, the amendments to the Act still leave open " * * * the question of whether the carrier was negligent and whether that negligence was *the proximate cause of the injury*." (Emphasis supplied.) Justice Frankfurter's concurring opinion in the same case leaves it crystal clear—indiscriminating use of terminology to the contrary notwithstanding—that the servant still assumes all risks inherent in the employment not arising from negligence on the part of the master. The theory that foreseeableness is not an element of actionable negligence in Federal Employer's Liability cases has been rejected. August v. Texas & N. O. R. Co., Tex. Civ. App., 265 S.W. 2d 148; and we are enjoined by the State Supreme Court in the recent case of Port Terminal Railroad Association v. Ross, Tex., 289 S.W. 2d 220, 226, that until required to do so by a positive declaration "of the highest federal tribunal" we are not to give effect to jury findings of actionable negligence when unsupported in the record.

[6] We know of no distinction basically between federal and Texas law in negligence actions. It is clear from

the Tiller case that both are governed by the same principles. To be actionable, negligence must be a proximate or foreseeable cause of an injury.

[7, 8] From the record before us, we find no support for the jury's finding of negligence, nor can there be unless it be negligence to require a man to exert his full physical capabilities. In Batson v. Smith, 196 Ark. 386, 117 S.W. 2d 731, 734, it is said, "We do not believe it to be an act of negligence to call upon an employee occasionally, when the occasion arises making it necessary, to exert his full strength in the accomplishment of the work in which he is engaged." (3) However, even if in any view of the record it may be said that the defendant negligently failed to assign a reasonably sufficient force to undertake the work in which the plaintiff was engaged when he had his heart attack, the record is still devoid of any evidence from which it may be fairly said that the defendant was charged with notice of any fact or facts from which *the heart attack* which plaintiff sustained could be anticipated as a result of the work to which he was assigned. Even plaintiff's doctors testified that there was no way for either plaintiff or defendant to anticipate such a result since a normal coronary artery can supply all the blood which any amount of exertion may cause the heart to demand.

[9] Plaintiff's brief evidences the highest quality of advocacy. It cites many cases on the question of foreseeability and proximate cause, not a few of which are also cited by defendant on the same points. Some of these are: Port Terminal Railroad Association v. Ross, Tex., 289 S.W. 2d 220; San Antonio and Aransas Pass Ry. Co. v. Behne, Tex. Com. App., 231 S.W. 354; International-Great Northern R. Co. v. Lowry, 132 Tex. 272, 121 S.W. 2d 585; Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W. 2d 228;

Hopson v. Gulf Oil Corp., Tex. Civ. App., 237 S.W. 2d 352; Gulf C. & S. F. Ry. Co. v. Ballew, Tex. Com. App., 66 S.W. 2d 659. These and other cases emphasize that foreseeability does not demand clairvoyance to anticipate the exact and precise nature of the injury complained of, but also stress that for a wrongdoer to be charged with actionable negligence he must be able to anticipate at least an injury "of the general nature of that which ensued." Port Terminal Railroad Association v. Ross, supra [289 S.W. 2d 224]. And "* * * it is requisite that the injury be of such a general character as might reasonably have been anticipated." San Antonio & Aransas Pass Ry. Co. v. Behne, supra [231 S.W. 356]. "A similar injury" must be foreseeable. International-Great Northern Ry. Co. v. Lowry, supra [132 Tex. 272, 121 S.W. 2d 588]; Atchison v. Texas & P. Ry. Co., supra. All cases cited by both sides are in accord on proximate causation. Nor is there dispute between the parties that the cases uniformly hold an employer, absent contrary knowledge, is entitled to assume that his employee is in good physical condition and not peculiarly subject to any special weakness. Haywood v. Galveston, H. & S. A. Ry. Co., 38 Tex. Civ. App. 101, 85 S.W. 433; Galveston, Houston & S. A. Ry. Co. v. Bonn, 44 Tex. Civ. App. 631, 99 S.W. 413; Swann v. Texas & P. Ry. Co., Tex. Civ. App., 200 S.W. 1131; Railway Express Agency, Inc v. Gray, Tex. Civ. App., 211 S.W. 2d 1013; Texas & P. Ry. Co. v. Rampy, Tex. Civ. App., 71 S.W. 2d 387; Louisville & N. R. Co. v. Willhite, 300 Ky. 75, 187 S.W. 2d 1010.

It seems to us that our own Supreme Court has ruled against plaintiff's contentions and sustained those of defendant by its opinion in Doty v. Fort Worth & D. C.

Ry. Co., 127 Tex. 521, 95 S.W. 2d 104, 105. In that case Doty while engaged as a member of a bridge gang, overexerted himself in moving heavy timbers. As a result of the over-exertion a blood vessel in his head burst and he later died. The jury found that the defendant's foreman failed to assign a sufficient number of men to assist Doty in doing his work, which was actionable negligence, and judgment was rendered in the trial court in favor of Doty's beneficiaries for the damages found by the jury. The Court of Civil Appeals reversed and rendered, 64 S.W. 2d 796, the Supreme Court granted error, but affirmed the judgment of the Court of Civil Appeals. In its opinion the Supreme Court pointed to the absence of evidence from which it could be inferred that in the ordinary course of things an injury such as was sustained by Doty would result to a normal man from work of the character in which he was engaged, stating that the foreman in assigning Doty to the work "had the right to assume that he was dealing with a man in normal physical condition and capable of doing heavy work like that required of members of a bridge gang, and that such a man, knowing his own strength, would not push or pull beyond his capacity to endure." The court held that in the absence of a showing of knowledge on the part of the employer that Doty was not in normal condition it could not be said that the employer was negligent or could reasonably have anticipated injurious consequences to Doty from assigning him to work requiring severe physical exertion. We quote: "The evidence does not raise an issue of fact as to the negligence of the railway company or its foreman. Neither does it raise an issue of fact on the related question of proximate cause, in which inheres the element of anticipation or foreseeableness of injurious consequences."

In the present case in view of the law's requirement that to be actionable injuries at least similar to those which resulted must be foreseeable, taken in connection with the undisputed evidence that in the normal circulatory system coronary arteries can withstand any amount of strain; we hold on the present record, as was found in Doty's case, that there is no evidence to support the jury's findings of actionable negligence. Cases from other jurisdictions in accord are. Creamer v Ogden Union Railway & Depot Co., Utah, 242 P. 2d 575; Lutgen v. Missouri Pac. R. Co., Mo. App., 294 S.W. 444; Hunter v. Busy Bee Candy Co., 307 Mo. 656, 271 S.W. 800; Patrum v. St. Louis & S. F. R. Co., 259 Mo. 109, 168 S.W. 622; Warden-Pullen Coal Co. v. Wallace, 176 Okl. 604, 56 P. 8d 802.

We are cited by plaintiff to a case by the Second Circuit Court of Appeals, Stewart v. Baltimore & O. R. Co., 137 F. 2d 527, 528, decided by a divided court. The case is the only one allowing recovery and involving a heart attack resulting from coronary thrombosis from the Federal jurisdiction to which we have been cited. No application for certiorari to the Federal Supreme Court was applied for in the Stewart case and the Supreme Court did not have an opportunity to pass on it. The Utah case of Creamer v. Ogden Union Railway & Depot Co., supra, was a Federal Employer's Liability Act case in which, on legally similar facts, the state court reached a result contrary to that arrived at in the Stewart case by the Federal Circuit Court. In the Creamer case an unsuccessful plaintiff applied to the United States Supreme Court for certiorari to the Supreme Court of Utah but the writ was denied. 344 U.S. 912, 73 S. Ct. 339, 97 L. Ed. 703. We realize that denial of certiorari by the Federal Supreme Court is of little, if any, weight as precedent. Still, in view of the

novelty and importance to a large class of litigants of the question involved in the Creamer case, and the fact that it arose under the Federal Employer's Liability Act, it is unlikely the Supreme Court would have let the judgment of the Utah Supreme Court stand unless it was satisfied with the result there reached.

It is inferable from the opinion of the majority in the Stewart case that the contentions of the defendant there were not the same as the contentions of the defendant here, and in the Creamer case. In the Stewart case a railroad employee sustained a coronary thrombosis from exertion in attempting to throw a stiff switch which was very difficult to move. Apparently defendant defended on the ground "that the switch was not really defective but only hard to move because new and stiff." There was no evidence in the Stewart case—at least the opinion states none—to establish that a normal coronary artery could withstand any amount of strain. In support of its opinion, the majority cites numerous cases where negligence in failing to furnish a sufficient force to do heavy work resulted in a recovery. But none of them involved heart attack or was decided under a record comparable to the one before us. Rather, in each instance the type of injury which resulted was such as would naturally and normally be expected to result from insufficient help in performing heavy tasks. In one, a heavy pole slipped and broke plaintiff's innominate bone; in another a heavy shaft fell on plaintiff's foot, severely injuring it. Other injuries involved in the several cited cases were: a wrenched and strained back and dislocation of vertebra from carrying a too heavy timber over broken ground; a double rupture from carrying a heavy rail; a broken leg suffered by an inexperienced workman in at-

tempting to lift a heavy piece of glass; a back injury from lifting a heavy handcar from the ground to a boxcar; injury to arm and shoulder, and hemorrhage from lifting and carrying a heavy angle iron to a platform, and injury to a knee from moving a piano up steps.

The dissenting opinion of Judge Chase seems to us more in line with heretofore unquestioned common law concepts, but even the dissent fails to make mention of any evidence such as in the present case establishing that the character of the injury there involved was not reasonably foreseeable from the defendant's claimed negligent conduct. It is inferable there was no such evidence in the case.

We are in similar position to that of the Federal courts in diversity cases when they must guess at what State courts of last resort will hold on questions of state law on which Federal courts must rule. In the present instance, the Stewart case by the Second Circuit to the contrary notwithstanding, we believe that when confronted with the questions we pass on in the present case the Federal Supreme Court will rule in line with what has come to be almost unbroken common law precedent.

The conclusions which we have reached make it unnecessary for us to consider other points of error assigned in appellants' brief.

The judgment of the trial court will be here reversed and rendered in appellants' favor.

Reversed and rendered.

CODY, J., not sitting.

APPENDIX B

STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U. S. Code. Sec. 1257.

APPENDIX C

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U.S. Code, Sec. 51.